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We have reviewed the letter, from DCI Turner to Senator Inouye concerning the discovery of certain documents relating to the MKULTRA program. On the basis of the information contained therein, as well as the published information concerning MKULTRA in the Rockefeller Commission Report and the Report on the Select Committee to Study Governmental Operations with respect to Intelligence Activities ("Church Committee Report"), S. Rep. No. 755, Book I, 94th Cong., 2d Sess. 389-411 (1976), it is our conclusion that it would be difficult, if not impossible, to obtain criminal convictions unless substantial new evidence is uncovered.

The only criminal statutes which we believe could encompass the MKULTRA program are 18 U.S.C. §§ 241 and 242. These statutes have been construed to require a specific intent to deprive a person of a federal right made definite either by the Constitution or the laws of the United States or by decisions interpreting them. See Screws v. United States, 325 U.S. 91, 101-7 (1945); Williams v. United States, 341 U.S. 97, 100-2 (1951). This requirement of specific intent is difficult to establish in any case, and is made even more so in this particular situation by the passage of time, the fact that normal records were not maintained, see, e.g., Church Committee Report at 405-6, and the destruction of many records in 1973. The records described in DGI Turner's letter do not appear to be of much help in this regard, since they are mostly financial documents and accordingly are probably of little relevance to the problem of specific intent.

Another problem here is raised by the statute of limitations. The period of limitations for this sort of prosecution is five years, 18 U.S.C. § 3282; since all MKULTRA activities ceased in 1964, the statute would appear to bar prosecution. The destruction of the records in 1973 might provide the basis, on a theory of continuing conspiracy, for a finding that the statute was tolled by this subsequent act in furtherance of the conspiracy. See United States v. Portner, 462 F.2d 678 (2d Cir. 1972); United States v. Nowak, 448 F.2d 134, 139 (7th Cir. 1971); United States v. Hickey, 360 F.2d 127, 140-41 (7th Cir. 1966). Any such approach, however, must be founded on a demonstration that the concealment of the program was a part of the original plan; it is not sufficient for this purpose to show merely that the participants kept the conspiracy secret and took steps to bury its traces. Grunewald v. United States, 353 U.S. 391 (1957); United States v. Davis, 533 F.2d 921 (5th Cir. 1976). This again poses problems of proof which would be difficult to establish.

Of course, the destruction of the records could itself be the basis for a criminal prosecution, either as misprison of a felony, 18 U.S.C. § 4, or as conduct rendering one an accessory after the fact. 18 U.S.C. § 3. Resort to these statutes, however, may exclude some with responsibility for the MKULTRA program and may encompass some with no involvement in that program. Moreover, problems of proof also occur under these statutes. The government would have to prove, first, that the MKULTRA program involved criminal activity, see Lancey v. United States, 356 F.2d 407, 409-10 (9th Cir. 1966), and then establish that the defendants acted with knowledge that a crime had been committed. Id.; Hiram v. United States, 354 F.2d 4, 7 (9th Cir. 1965).\*/ A prosecution under these statutes thus raises some of the same sorts

\*/ It is also possible that, in view of the evident purpose of 18 U.S.C. §§ 3 and 4 to aid in the detection and prosecution of crime, a court would hold the statutes inapplicable to conduct taken after the statute of limitations had expired with respect to the underlying criminal activity. This could bar a prosecution for action taken in 1973 to "cover up" activity which ended in 1964.

of proof problems discussed with respect to 18 U.S.C. §§ 241 and 242, and must further deal with the fact that all records known to those involved were not destroyed. These factors could, in the absence of the development of further evidence, well justify a conclusion that a prosecution was not warranted.

The destruction of records could also constitute a violation of 18 U.S.C. § 2071, which prohibits the willful and unlawful destruction of government records. The purpose of this provision is to prevent conduct which deprives the government of its use of documents, United States v. Rosner, 352 F.Supp. 915, 919-20 (S.D. N.Y. 1972), and that purpose cannot be said to be inapplicable here. However, to prove a violation of this statute the government must establish that the defendant intentionally destroyed records with the knowledge that he was breaching the law. See United States v. Cullen, 454 F.2d 386, 391-92 (7th Cir. 1971); United States v. Moylan, 417 F.2d 1002, 1004 (4th Cir. 1969). This element may be difficult to establish, since the disposition of federal records is largely left to the head of the agency, 44 U.S.C. § 3105, and DCI Helms personally authorized the destruction of the records in this instance.

DCI Turner reports a "possible improper contribution" involving an ostensibly private donation to a private medical institution which resulted in a matching grant of federal funds. This occurred over 20 years ago, and accordingly any prosecution would most likely be barred by the statute of limitations. Moreover, the CIA's General Counsel apparently concluded that this donation was lawful.

In conclusion, in light of the difficulty of proving any offense with respect to the MKULTRA program, the sole possibly criminal act is the 1973 destruction of records. That act was criminal only if it was undertaken with the intent to conceal a crime, or with recognition that the destruction was unlawful. Whether the original MKULTRA program involved criminal conduct and whether the destruction of records was part of an attempt to conceal that criminal conduct are both essentially questions of fact which will be extremely difficult to resolve on the basis of the evidence which is now obtainable; the same is true as to the parties' knowledge of the legality of the destruction of the records. However, at least a review of the records which

DCI Turner has made available to Justice and a preliminary investigation of the circumstances surrounding the destruction of other records in 1973 would appear to be called for if for no other reason than to determine that there is in fact no evidence of a prosecutable offense.

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